prior to its adjudication in bankruptcy, engaged in the construction specialties business. At all times in question, its Board of Directors was composed of Charles W. Laing, President, and E. J. Hilkert, Secretary-Treasurer, Mr. Laing serving as General Manager of the operation of the business and Mr. Hilkert serving only in an advisory capacity when special questions came to his attention.

Plaintiff is the Trustee in Bankruptcy of the Estate of the Laing Corporation and brings this action pursuant to an Order of this Court. Defendant Mutual of New York Life Insurance Company, a corporation, hereinafter referred to as Insurance Company, a licensed insurer in the State of Arizona, issued three policies of insurance upon the life of Laing; to-wit:

A. Policy #823-53-41S (Exhibit "A") naming the Laing Corporation as the beneficiary and also the "rights owner".

B. Policy #8396309 naming Mrs. Laing as the beneficiary and Mr. Laing as the owner (not admitted in evidence).

C. Policy #8006801S also naming Mrs. Laing as the beneficiary and Mr. Laing as the owner, (also not admitted in evidence).

Although reference has been made to all three policies at the trial, Policy #823-53-41S (Exhibit "A") is the policy in issue here and the subject of this law suit. Said policy will hereinafter be referred to as the corporate policy.

The corporate policy was issued by the Insurance Company on August 26, 1957. It was in the face amount of $40,000 but it also provided that:

> "The amount of the Accidental Death Benefit will be doubled in the event that the death for which the Benefit is payable occurred as the result of riding as a passenger in an aircraft * * *."

The Laing Corporation is named as beneficiary and "rights owner". "Rights" by the policy being defined as:

> "* * * the rights to change the beneficiary, to assign, and all other rights, benefits, options, and privileges conferred by this Policy or allowed by the Company."

The corporate policy provided for quarterly premiums of $364.80 due on the 27th days of October, January, April and July, of each year in which the policy was in effect, 31 days' grace being allowed thereafter. Whether the premium due January 27, 1961 has been paid is the principal issue in this action.

Laing, the insured on the corporate policy, was killed April 22, 1961, as the result of riding as a passenger in an aircraft; plaintiff filed with the Insurance Company a claim for death benefits under the policy, which claim was disallowed by the defendant Insurance Company for the asserted reason that prior to the death of the insured, Charles W. Laing, the corporate policy lapsed for non-payment of the January 27, 1961 premium.

If the January 27, 1961 premium has been paid, the policy was in full force and effect at the date of death, and benefits are due to the beneficiary and therefore, its successor, the plaintiff herein. If the January 27, 1961 premium has not been paid, the policy has lapsed.

It is plaintiff's contention that the defendant Insurance Company was indebted to the Laing Corporation in the sum of $458.55 on the 27th day of January, 1961, and that being so indebted, the said sum of $458.55 should, and as a matter of law, conclusively have been presumed to be applied to the payment of the January, 1961 premium on the corporate policy #823-53-41S, and that, therefore, said policy was in full force and effect until after the death of the insured on April 22, 1961. This claim of indebtedness is based upon plaintiff's contention that defendant's application of the said sum of $458.55 of the loan proceeds on the corporate policy to the payment of Laing's own personal policy was unauthorized and that therefore, on January 27, 1961, defendant held money in its possession belonging to the Laing Corporation sufficient in amount to pay said premium of January 27, 1961.

The following taken from defendant Insurance Company's statement of facts in its opening memorandum is undisputed. Laing was one of the incorporators of the Laing Corporation; he was one of the only two stockholders; one of the only two directors; as president, one of the only two officers and the sole managing agent of the corporation. The only other stockholder and director was the corporation's Secretary-Treasurer, E. J. Hilkert, who was also one of the incorporators. Hilkert testified that he never took an active part in the operations of the company and his only relation to it, really, was as the corporation's major creditor by reason of due and unpaid salary in the amount of $80,000.

Defendant Insurance Company in its Answer to the plaintiff's Amended Complaint admits the following:

1. That plaintiff is the duly appointed, qualified and acting Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., Bankrupt, and pursuant to the Order of the District Court for the District of Arizona, brings this action for and on behalf of said bankrupt estate, and the creditors of said bankrupt.

2. That it is a corporation duly licensed to do insurance business within the State of Arizona.

3. That it issued the corporate policy of insurance, #823-53-41S, on August 26, 1957, in the face amount of $40,000 upon the life of Charles W. Laing, payable to the Laing Corporation.

4. That said policy provides for an additional death benefit equal to the face amount of the policy in the event of death occurring as the result of riding as a passenger in an aircraft, and admits that said insured died as a result thereof on April 22, 1961.

Defendant Insurance Company alleges that said corporate policy had lapsed for non-payment of the premium due January 27, 1961, and that pursuant to provisions thereof, the policy became reduced paid-up insurance in the amount of $351.31, which sum, defendant's Exhibit "D", was tendered by the Insurance Company to the beneficiary Laing Corporation and was accepted by the Trustee herein as full settlement of benefits due upon the corporate policy, and Insurance Company denies that anything is owing by it upon said policy.

Plaintiff's contentions are the following:

1. That Insurance Company was indebted to the Laing Corporation and the Trustee in the sum of $458.55 and held same for plaintiff's benefit on January 27, 1961.

2. Plaintiff's claim of such indebtedness by the Insurance Company is based upon the following:

In August of 1960, Mr. Tom Lillico, as the Phoenix representative of defendant Insurance Company, discussed making a loan against the corporate policy with Laing. At the request of the Insurance Company and pursuant to its normal procedure for processing such a loan, formal application for the loan (Exhibit "H") was submitted to Hilkert who signed it. The loan requested was $2,491.46. As a further requirement for approval of the loan, written confirmation of Hilkert's authority to sign the application on behalf of the corporation was also requested. The application itself also bears the notation as follows: "Subject to Resol. of B of D of Corp. authorizing Secretary to request loan." This written confirmation of the Secretary's authority was received by letter from Laing on Laing Corporation stationary (Exhibit "I"). The loan application made by the Laing Corporation was approved and checks for the loan proceeds were delivered by Lillico. Disbursements of the loan of $2,491.46 were as follows:

(1) To pay July 27, 1960 premium on corporate policy #823-53-41S (Exhibit "A")	$ 346.80
(2) To pay premium on policy #83-96-309 owned by Laing personally	458.55
(3) Balance to the Laing Corporation by check (Exhibit "E")	1668.11
	$2491.46

Plaintiff contends that disbursement of the sum of $458.55 of Laing Corporation loan proceeds in payment of premium on Policy #83-96-309 owned by Laing personally was made at the oral request of Laing only, without any request, authorization or confirmation of authority by E. J. Hilkert. The sum of $458.55 of the Corporation loan proceeds which were used to pay Laing's personal premium were more than sufficient to pay the January 27, 1961 premium on the corporate policy and keep the policy in effect through the date of death.

3. That being indebted to plaintiff in a sum sufficient to pay the January, 1961 premium, Insurance Company is, as a matter of law, conclusively presumed to have applied said indebtedness to prevent a lapse of the corporate policy, and said policy was, therefore, at the date of death of Laing, in full force and effect.

Plaintiff Trustee asserts that inadvertent and unauthorized endorsement and deposit of the "settlement check" of $351.31 (Exhibit "D") into plaintiff's account without his knowledge, and without knowledge

of the person depositing same of facts sufficient to show it was incorrect, and without an actual intent to accept it in full settlement, does not constitute an accord and satisfaction, settlement or release, of a just contractual claim.

Defendant Insurance Company, relying upon nonpayment of a premium as ground for forfeiting the corporate policy, has the burden of proving such nonpayment.

> "[1] It is the general rule of law that, where an insurer pleads and relies upon the nonpayment of a premium * * * for forfeiting the policy after it has once been placed in force, the burden of proving such nonpayment is upon it."
>
> *Sovereign Camp W.O.W. v. Madrigal* (Ariz.), 12 P.2d 615, 616.

Forfeiture of an insurance policy will not be declared if under any reasonable theory of construction it can be avoided.

> "[2, 3] * * * it is practically a universal rule of construction that an insurance contract is construed most strongly against the insurer. 32 C.J. 1152. It is also the rule of law that a forfeiture of a policy will never be declared if under any reasonable theory of construction it can be avoided. 32 C.J. 1296."
>
> *Northern British & M. Ins. Co. v. San Francisco Secur. Corp.* (Ariz.), 249 P. 761, 762.

It therefore appears from the evidence that on and before January 27, 1961, defendant Insurance Company was indebted to the Laing Corporation in the

sum of $458.55, as shown above by page vi, line 1, and page viii, line 2, of this Opinion.

See *Commonwealth Life Insurance Co. v. Gault's Adm'rs* (Ky.), 76 S.W.2d 618, 620. There the Court stated:

> "[1, 2] It is an accepted rule: 'If an insurer is indebted to an insured, and has, or should have, in its hands, sufficient funds belonging to and due him, to pay an assessment or a premium when due, it cannot forfeit its policy or certificate for non-payment; rather, it should appropriate such funds to prevent a forfeiture, no matter from what source such funds were derived.'"

And the Supreme Court of Arizona has taken the same position:

> "The uncontradicted evidence is that defendant had on hand at all times the sum of $229.70 belonging to the insured which the latter could apply upon his premium if he so desired, and, indeed, it was the duty of the insurer, if such sum would have paid a premium installment due, to make such application rather than to allow the policy to lapse."
>
> *Equitable Life Assur. Soc. of the United States v. Rettid,* 11 P.2d 833, 837.

On the question that the law does not favor forfeiture of insurance policies, the Court of Appeals of Kentucky in *Cheek v. Commonwealth Life Ins. Co.,* 126 S.W.2d 1084, 1090, had the following to say:

> "[16-17] It is axiomatic that the law does not favor forfeitures of insurance policies. To

that end, as stated upon abundant authority in Commonwealth Life Insurance Company v. Gault's Adm'rs, supra, 76 S.W.2d 620: 'It is an accepted rule: "If an insurer is indebted to an insured, and has, or should have, in its hands, sufficient funds belonging to and due him, to pay an assessment or a premium when due, it cannot forfeit its policy or certificate for non-payment; rather, it should appropriate such funds to prevent a forfeiture, no matter from what source such funds were derived."'"

Mr. William D. Price, a witness called on behalf of the defendant, testified in part as follows: That he was an accountant for the Trustee in Bankruptcy in this matter and that his appointment was shortly after the Trustee was appointed. Price testified under examination by Miss McConnell, plaintiff's attorney: (Tr. 327)

"Q Now, Mr. Price, I will hand you what has been marked as Defendant's Exhibit D, which is the check from Mutual of New York to the Laing-Garrett Construction Specialties for $351.31 and which is alleged to have been a settlement check on the policy.

"Have you ever seen that check before?

* * *

"A I believe that I may have seen this check before. In fact, I believe I would have to say that I have seen it before.

"Q Did you personally deposit this check in the Trustee's account?

"A No, ma'am.

* * *"

(Tr. 328, line 14):

(By Miss McConnell) "Q Can you tell from examining the check who deposited the check to the trustee's account?

"A I would say that it was done by our office, the secretary in the office.

"The Court: What office is that?

"The Witness: My office, the accounting office.

* * *"

(Tr. 329):

"Q I am talking primarily about your Phoenix office.

"A We have probably eight or nine people.

"Q You state that this was deposited by one of the girls in the office?

"A By the receptionist and the secretary.

"Q Was this at your instructions?

"A No.

"Q Was she authorized to deposit and accept a settlement check without express instructions from you or the trustee?

"A No, ma'am.

* * *

"Miss McConnell: Q If the check had come to your attention, Mr. Price, would you have deposited it without specific instructions to take it?

"A Most of these checks dealing other than just with accounts receivable that come in through our office for the various bankruptcy accounts are transmitted to us by a letter from the Trustee or the attorney for the Trustee with special instructions as to what to do with them.

"Q Did you ever receive that instruction from the trustee or any of his representatives to deposit this check?

"A No, ma'am.

"Q At the time the check was deposited, did you personally have any knowledge that the amount of the check was incorrect?

"A No, ma'am.

"Q Or that there was possibly any dispute about the check or the amount due to the estate from the insurance company on this policy?

"A Not at that particular time, I did not."

In the *Cheek v. Commonwealth Life Ins. Co.* case, 126 S.W.2d 1084 at 1089, the Court, dealing with a question of a purported release such as is claimed here, held:

"[7] As stated in Horn v. Atlas Assurance Society, 241 Ky. 226, 43 S.W.2d 675, 678: 'Where one releases a claim in ignorance of the existence of a right, as where by mistake one assumes a debt due him to be smaller than it is, he is not estopped from collecting the balance. * * * It is like the payment made by the company in New York Life Insurance Company v. Van Meter's Adm'r, 137 Ky. 4, 121 S.W. 438, 136 Am.St.Rep. 282, in settlement of a cash value of a life insurance contract of a sum much less than the value fixed by the policy.'"

The Court must find from the uncontradicted testimony of the witness William D. Price, Tr. 328, that Exhibit "D", the check for $351.31 bearing on its face the statement "in full settlement of payee's interest Policy Number 823 53 41 in payment of Death Benefit," was deposited by the Secretary-Receptionist in the office of Mr. Price, the Accountant. This deposit was made without knowledge of the Trustee. On the

reverse side of the check, Exhibit "D", appears an endorsement, "For deposit only Estate of Liang-Garrett Construction Specialties, Robert G. Mooreman, Trustee-Receiver." Under the testimony, the handwriting could not possibly be that of Robert G. Mooreman. It evidently is the handwriting of the Secretary-Receptionist in Mr. Price's office. The signature "Robert G. Mooreman" is undoubtedly in the same handwriting as the balance of the handwriting in the deposit endorsement. Furthermore, the Trustee would have no authority to settle this litigation without the approval of the Court. General Order in Bankruptcy 33, 11 U.S.C.A. following § 53, clearly indicates that a trustee in bankruptcy must have the authority of the Court "to submit to arbitration any controversy arising in the settlement of an estate, or for authority to compromise any such controversy."

A judgment rendered on behalf of plaintiff in this action would include interest at the rate of 6% per annum on the amount thereof from the date of the rendition of said judgment until paid. *Arizona Eastern R. Co. v. Head,* 224 P. 1057 (Ariz.).

As to the jurisdiction of the Court, § 46 of 11 U.S.C.A. provides:

> "(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been

instituted and such controversies had been between the bankrupts and such adverse claimants.

"(b) Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, except as provided in sections 96, 107, and 110 of this title."

The articles of incorporation of the Laing Corporation were filed with the Arizona Corporation Commission on March 28, 1950 (plaintiff's Exhibit 1). We have seen that the defendant Insurance Company has admitted, among other matters, that it was and is a corporation duly licensed to do insurance business within the State of Arizona. It is apparent, therefore, that the Mutual of New York Life Insurance Company is not a corporation organized and existing under and by virtue of the laws of Arizona.

Section 1391 of 28 U.S.C.A., in part, provides:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

So, therefore, the Laing Corporation might have prosecuted the defendant Insurance Company in the United States District Court for the District of Arizona prior to the institution of bankruptcy proceedings. However, this defendant Insurance Com-

pany has consented, within the meaning of 11 U.S.C.A. § 46(b), to the institution and prosecution of this action.

McEldowney v. Card (E.D. Tenn.), 193 F. 475, was an action brought by the plaintiff McEldowney as Trustee in Bankruptcy of the Estate of the Clairfield Lumber Company to recover the sum of $9,000, alleged to be due him. On page 478, District Judge Sanford, in his opinion, stated:

> "The authorities are uniform that it is not necessary that the consent of the proposed defendant shall be given in writing or upon the record in express terms or in advance of the institution of the suit, but that he will be deemed to have sufficiently consented if he appears and pleads to the merits, without objection to the jurisdiction for want of consent, and will not be allowed thereafter to withdraw his consent or object to the jurisdiction of the court on the ground of want of consent."

At the outset of the trial of this case (Tr. 8), the Court inquired:

> "The Court: No question about Federal jurisdiction here, is there?
>
> "Miss McConnell: I don't believe so, your Honor. The plaintiff is a representative of the bankruptcy court, and the amount in question certainly exceeds any jurisdictional limits."

Defendant was silent. Here was an opportunity to object to the jurisdiction for want of defendant's consent if, indeed, such consent was required under

the circumstances here. At no time throughout the trial or in any of the defendant's written memoranda has there been a suggestion on the part of the defendant that it did not consent to the institution and prosecution of this action and of the proceedings therein.

The defendant here has earnestly and vigorously contested every contention of the plaintiff and, as held by Judge Sanford in the quotation above, the defendant will be deemed to have sufficiently consented by its appearance and pleadings to the merits without objection to the jurisdiction for want of consent and will not be allowed thereafter to withdraw its consent or object to the jurisdiction of the Court on the ground of want of consent.

This Court has jurisdiction of this action and of the parties hereto.

Now, upon consideration of all the evidence adduced at the trial and in addition to the findings hereinabove set forth including the admissions of the defendant, the Court makes the following findings of fact:

FINDINGS OF FACT

1. That plaintiff is the duly appointed, qualified, and acting Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., Bankrupt, and pursuant to the Order of the District Court for the District of Arizona, brings this action for and on behalf of said bankrupt estate and the creditors of said bankrupt against defendant Mutual of New York Life Insurance Company.

That said defendant is a corporation duly licensed to do business within the State of Arizona.

2. That this Court has jurisdiction of this action and of the parties hereto.

3. That on or about the 26th day of August, 1957, and for valuable consideration therein stated, the defendant, by its agents duly authorized thereto, executed its policy of insurance No. 823-53-41S in writing upon the life of Charles W. Laing in the sum of $40,000.

4. That said policy provides that in the event that the death for which the benefit is payable occurred as a result of riding as a passenger in an aircraft, that the accidental death benefit will be equal to double the face amount, stated on page 1 of the policy, Exhibit "A".

5. That on or about the 22d day of April, 1961, said insured Charles W. Laing died as a result of riding as a passenger in an aircraft.

6. That said Laing Corporation had a valuable insurable interest in the life of the insured at the time of his death and at the time of effecting said insurance in that the said insured was the president and officer of Laing Corporation, whose continued management was essential to the operation of said business; that the said Laing Corporation was the beneficiary named in the policy above referred to.

7. That plaintiff has heretofore and prior to the commencement of this action given to defendant due notice and proof of death of insured, and demanded payment of the proceeds of said policy.

8. That said sum has not been paid nor any part thereof.

9. That defendant Insurance Company was, on and before January 27, 1961, indebted to the Laing Corporation in the sum of $458.55 and then held the same for the benefit of the Laing Corporation.

10. That Laing did not at any time have apparent nor implied authority to use corporate funds to pay any premium on Policy # 83-96-309 owned by Charles W. Laing personally; and that said Laing had no authority to use said sum of $458.55 to pay a premium on his said policy, and had no authority to instruct the Insurance Company to apply said sum of $458.55 in payment upon his personal policy.

11. That defendant Insurance Company had no right nor authority to use the said indebtedness, $458.55 of corporate loan proceeds, to pay a premium on Policy # 83-96-309 owned by Charles W. Laing personally, or upon the payment of any other policy other than the "corporate policy."

12. That the Laing Corporation did not at any time have actual nor implied notice of use of corporate funds by Laing to pay any premium on his said personal Policy #83-96-309.

13. That being indebted to plaintiff in a sum sufficient to pay the January, 1961 premium, defendant Insurance Company should and is conclusively presumed to have applied said indebtedness to payment of the premium of January 27, 1961, and thereby prevent a lapse of said policy.

14. That the premium which became due January 27, 1961, on the said corporate policy was paid within the time required by said policy and that, therefore, the said policy was, on and before January 27, 1961, and after the death of the said Charles W. Laing, in full force and effect.

15. That the so-called settlement check, Exhibit "D", was not endorsed by the Plaintiff-Trustee, Robert G. Mooreman, and that the endorsement thereon was unauthorized and said deposit was inadvertently and mistakenly made without an actual intent to accept it as a settlement.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court decides:

1. That the premium which became due on Policy #823-53-41S, the corporate policy, was paid on and before January 27, 1961, and that said corporate policy was in full force and effect at the time of and after the death of the insured on April 22, 1961.

2. That the said endorsement and deposit of the so-called settlement check, Exhibit "D", does not constitute an accord, satisfaction, settlement or release of any just contractual claim of the plaintiff and was not accepted as such by the plaintiff.

3. That the plaintiff, Robert G. Mooreman, as Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., is entitled to judgment against the defendant Mutual of New York Life Insurance Com-

pany, a corporation, in the sum of $80,000 with interest thereon, at the rate of 6% per annum from the date of rendition of said judgment, until paid, together with his costs herein incurred.

In accordance herewith, the plaintiff shall submit a form of judgment to the Court.

Dated: This 15th day of December, 1964.

Roger T. Foley,
U. S. Senior District Judge.

United States District Court for the
District of Arizona

Civ. No. 4359 Phx.

Robert G. Mooreman, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,
Plaintiff,
vs.
Mutual of New York Life Insurance Company, a corporation,
Defendant.

AMENDED CONCLUSION OF LAW

This matter coming on regularly for trial the 4th day of December, 1963, plaintiff appearing in person and by his attorney, Beverly J. McConnell, defendant appearing by its counsel, Ralph J. Lester, evidence having been presented, the Court being fully advised in the premises, and having rendered its Opinion, Findings of Fact and Conclusions of Law on the 15th day of December, 1964.

Now, Judgment herein not having yet been entered, the Court hereby makes the following amended conclusion of law: [Cohn v. United States, 6 Cir., 259 F. 2d 371]

3. That the defendant, Mutual of New York Life Insurance Company, a corporation, is now and has

been, at all times since the 22d day of April, 1961, indebted to Laing-Garrett Construction Specialties, Inc. for the face amount of Policy #823-53-41S, the corporate policy, with double indemnity, to-wit: $80,000.00 less the sum of $3,261.70 being the total sum of the following items:

The unpaid loan balance of	$ 2,491.46
together with interest thereon to January 27, 1961 in the sum of	51.08
Also less the partial payment of	351.31
Also less the premium due on October 27, 1960 on said corporate policy in the sum of	364.80
together with interest thereon to January 27, 1961 in the sum of	3.05
TOTAL	$ 3,261.70
Leaving a balance of	$76,738.30
to which is to be added the sum of being the difference between the sum of $458.55 of proceeds of said corporate loan wrongfully diverted by defendant and the premium due on said corporate policy on January 27, 1961, in the sum of $364.80.	93.75
GRAND TOTAL	$76,832.05

Dated: This 26th day of April, 1965.

Roger T. Foley,
U. S. Senior District Judge.

United States Court of Appeals
for the Ninth Circuit

The Mutual Life Insurance Company of New York, a corporation, Defendant-Appellant, vs. Robert G. Mooreman, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., Plaintiff-Appellee.	No. 20,225

[September 19, 1966]

On Appeal from the United States District Court
for the District of Arizona

Before: Hamlin, Merrill and Duniway, Circuit Judges

Merrill, Circuit Judge:

The question on this appeal is whether a policy of life insurance issued by appellant had lapsed for non-payment of a premium prior to the death of the insured.[1] The District Court ruled that it had not; that while the crucial premium had not been paid by the owner, appellant at that time was indebted to the owner in an amount in excess of the premium and that payment must therefore be presumed to have been made by operation of law.

---

[1]Jurisdiction is grounded on the Bankruptcy Act, 30 Stat. 552 (1898), as amended, 11 U.S.C. §46 (1964).

Appellee is trustee in bankruptcy of the Arizona corporation which was the owner and beneficiary of the policy in question. The policy insured the life of Charles W. Laing, president of the corporation. Laing died April 22, 1961. This suit was brought by appellee to recover the death benefits provided by the policy.

The alleged lapse occurred as follows: The quarterly premium due October 27, 1960, was not paid by the beneficiary corporation but was paid by application of an automatic premium loan provision contained in the policy. The premium due January 27, 1961, was not paid. The policy prohibited the payment of two successive premiums through the application of the automatic premium loan provision. On March 22, 1961, appellant notified the beneficiary corporation that the policy had lapsed through nonpayment and the expiration of a 31 day grace period, but that the policy might be reinstated if the company chose to apply for reinstatement and pay the back premiums. By the time of Laing's death, a month later, the beneficiary had not applied for reinstatement.

The indebtedness of appellant to the beneficiary corporation which the District Court found to exist arose in this manner: On August 30, 1960, the beneficiary corporation applied to appellant for, and was granted, a loan on its policy in the sum of $2,491.46. The proceeds were applied as follows: $364.80 was applied as payment of the premium on the corporate policy due July 27, 1960; a check in the sum of $1,668 was issued to the beneficiary corporation and subsequently de-

posited by it in its bank account; the sum of $458.55 was, on the oral instructions of Laing, applied by appellant as payment of a premium due on a different policy insuring Laing's life on which Mrs. Laing was the beneficiary and in which the corporation had no interest. This last payment of $458.55 constitutes the alleged debt in issue. The District Court found that Laing was without corporate authority, actual or apparent, to appropriate corporate funds in this manner. The sum of $458.55 having never been paid to the borrower remained due and owing.

Appellant here contends that the record establishes as matter of law that Laing had both apparent and implied actual authority to use corporate funds in this manner. We agree.

The corporate stock was owned in equal shares by Laing and one Hilkert, who served nominally as secretary-treasurer. The board of directors consisted of Laing and Hilkert,[2] but the actual operation of the corporation was most informal. No regular meetings were held or minute books kept; Laing, who was experienced in the construction field in which the corporation operated, was the general manager and conducted the business affairs. Hilkert, although on salary, performed none of the normal duties of his offices. He did not participate in the day-to-day operations or in the keeping of the books or records and paid almost no attention to the corporate business, but confined himself to his practice of law and accounting in a separate office. He testified: "I only devoted part

[2]Arizona does not have the common requirement for at least three directors.

time when I was called upon for special things * * * whenever there was anything out of the ordinary that required concurrence, Mr. Laing usually came to my office and discussed the matter."

Both Hilkert and Laing maintained open accounts with the corporation and used corporate credit for certain personal purposes. Hilkert testified that these were confined to "accommodation purchases" of merchandise on which the corporation received a discount. The corporation was billed for such purchases, paid for them with corporate funds, and the amounts so paid were charged on the open account against the purchaser. In Hilkert's case such charges were against his unpaid salary, and at the time of bankruptcy the corporation was indebted to him in the sum of $80,000, largely for salary. (As such he is one of the principal creditors of the bankrupt estate.) Laing's case was quite different. His account apparently reflected not only "accommodation purchases," but also cash withdrawals and general personal uses of various sorts, including an airline trip for himself and his wife. At the time of his death he had overdrawn his salary in the amount of approximately $22,000. (Hilkert testified that Laing's book debt was somehow balanced by another account in the name of Mrs. Laing, containing personal funds of both the Laings plus corporate funds.)

Hilkert was asked whether, as far as he was concerned, there was "anything for or against using the credit of the corporation or the cash of the corporation for private purposes." He answered: "Except

that if there was anything that I felt was overdoing it, I objected to it * * *. In other words, there was always, we will say, a limit in the tolerance between Mr. Laing and I" in such use of corporate credit.

Thus the record establishes an understanding between the stockholders of the corporation that, subject to reimbursement to the corporation, Laing could feel free to use corporate credit or cash for personal needs, subject only to Hilkert's objection if Laing were felt to be "overdoing it."

Laing's personal insurance policy was taken out in March, 1959. Two weeks later Laing applied to the insurance company for its "MONY-Matic monthly premium check plan," an arrangement whereby the insurance company could draw directly on the bank account of the premium payer for premiums due. Here the application was to draw upon the corporate bank account in the amount of $149.03 each month. It was signed "C. W. Laing, President," and "R. C. Stremble," a corporate employee authorized to sign checks.

Thereafter, MONY-Matic payments were drawn directly from the corporate account through March, 1960, and the next two premiums were paid by corporate check. That these payments were made was sufficiently demonstrated by bank records introduced in evidence, plus charges on the corporation's books in precisely the amount of the premiums. That they were made would also be apparent to anyone familiar with the business, as the canceled drafts were returned to the corporation each month with other canceled checks,

and they bore the Mutual plan's identification on their face. No objection was ever made by Hilkert.

In our judgment, under the arrangement between the stockholders, Laing reasonably could feel authorized to charge his open account with insurance premiums until objection was voiced by Hilkert. We conclude that he was impliedly authorized to act in that manner. *Restatement (Second), Agency* §7 comment c; §43 (1958).[3]

At the time of the transaction here in question the insurance company was aware that for over a year the corporation had been paying premiums on Laing's personal policy, that such payment plan appeared to have corporate authority at the outset, and that no corporate protest had ever been made. The application for the loan was itself signed by Hilkert, which gave added assurance that the corporation was aware of dealings with the insurer. The use made of the proceeds of the loan was in no significant respect different from the MONY-Matic transactions; the premium simply was paid directly out of corporate cash instead of through the corporate bank account.

Hilkert testified (and the District Court found) that he had no knowledge of the MONY-Matic arrangement or payments. In our view he should be charged with such knowledge. Had he been performing the duties for which he now claims compensation he certainly would have known. But more, knowledge was not essential to authority. Under his arrangement

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[3]See also *Sweet v. Lang*, 14 F.2d 762 (8th Cir. 1926); *Reif v. Equitable Life Assur. Soc.*, 268 N.Y. 269, 197 N.E. 278 (1935); *Gonzales & Co. v. Thomas*, 42 Ariz. 308, 25 P.2d 552 (1933).

with Laing, if Laing's exercise of his general authority was to be kept within bounds, it was Hilkert's obligation to keep himself informed as to the extent of Laing's borrowings.

Appellee contends that the arrangement between Hilkert and Laing must be disregarded as not the formal act of the corporation. This contention we reject. The facts are clear that both stockholders joined in dispensing with any need for formal corporate action. Hilkert's conduct invited Laing to hold himself out as possessing full corporate authority to engage in the questioned transaction. That conduct in a corporation as closely held and informally operated as this one is chargeable to the corporation, at least where no insolvency is proved to result from the transaction.[4]

We conclude that Laing was invested by the corporation with apparent authority to make personal use of corporate funds on the occasions in question, on which apparent authority the insurance company justifiably relied. *Restatement (Second), Agency* §49 comments b, c; §43 (1958).[5]

It follows that no debt was owed to the corporation by the insurance company at the time the corporate policy lapsed.

Judgment reversed.

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[4]*Sweet v. Lang, supra,* note 2; *Little v. Garabrant,* 35 N.Y.Supp. 689 (Sup.Ct. 1895); *Bashford-Burmeister Co. v. Hammons,* 36 Ariz. 173, 283 Pac. 926 (1930).

[5]See also *Hall v. Crawford & Delphenis,* 11 S.W.2d 804 (Tex. Civ.App. 1928); *Glens Falls Indemnity Co. v. Palmetto Bank,* 23 F.Supp. 844 (W.D.S.C. 1938); *Arizona Southwest Bank v. Odam,* 38 Ariz. 394, 300 Pac. 195 (1931).

United States Court of Appeals
For The Ninth Circuit

The Mutual Life Insurance Company of New York, a corp., Defendant-Appellant, vs. Robert G. Mooreman, etc. Plaintiff-Appellee.	No. 20,225

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in this Court in favor of Mutual Life Insurance and against Robert G. Mooreman.

COSTS:

Fee: Notice of appeal	$5.00
Cert. Fee:	2.00
One-half docket fee:	12.50
Reporter's trans.	407.13
Reproduction charges	14.60
Premium on sup. bond	1660.00
TOTAL	$2101.23

Filed and entered September 19, 1966.